

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 PUGET SOUNDKEEPER ALLIANCE,
11 SIERRA CLUB, and IDAHO
12 CONSERVATION LEAGUE,

13 Plaintiffs,
14 v.
15 ANDREW WHEELER,¹ in his official capacity
16 as Acting Administrator of the United States
Environmental Protection Agency, and R.D.
JAMES,² in his official capacity as Secretary of
the Army for Civil Works,

17 Defendants.

18 CASE NO. C15-1342-JCC

19 ORDER REQUESTING
20 ADDITIONAL BRIEFING

21 This matter comes before the Court *sua sponte*. Having reviewed the summary judgment
22 briefing of Plaintiffs (Dkt. Nos. 67, 83), Intervenors (Dkt. Nos. 72, 86), and Defendants (Dkt.
23 Nos. 79, 87), the Court hereby ORDERS the parties to submit additional briefing addressing
several issues, including why the Court should not stay this case.

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25 ¹ Pursuant to Federal Rule of Civil Procedure 25(d)(1), Andrew Wheeler, Acting
Administrator of the U.S. Environmental Protection Agency, is substituted for Scott Pruitt, who
was substituted as a defendant for Gina McCarthy.

26 ² Pursuant to Federal Rule of Civil Procedure 25(d)(1), R.D. James, Secretary of the
Army for Civil Works, is substituted as a defendant for Jo-Ellen Darcy.

1 **I. BACKGROUND**

2 **A. The Clean Water Act**

3 The Clean Water Act of 1972 (the “CWA”), 33 U.S.C. §§ 1251–388, prohibits the
4 discharge of pollutants into “navigable waters” absent compliance with the CWA’s permitting
5 requirements and other pollution prevention programs. 33 U.S.C. § 1311(a). Such programs
6 include the § 404 National Pollutant Discharge Elimination System; the § 404 permitting
7 program for discharges of dredged or fill material; and the § 311 oil spill prevention and
8 response programs. *See* 33 U.S.C. §§ 1321, 1342, 1344.

9 “Navigable waters” is defined as “the waters of the United States, including the territorial
10 seas” (“WOTUS”). *See* 33 U.S.C. §§ 1251, 1321, 1342, 1344, 1362(7). Waste treatment systems
11 were excluded from the definition of WOTUS, and following a notice-and-comment period, a
12 1980 rulemaking clarified the application of this exclusion as “only to manmade bodies of water
13 which neither were originally created in waters of the United States (such as a disposal area in
14 wetlands) nor resulted from the impoundment of waters of the United States.” Consolidated
15 CWA Permit Regulations, 45 Fed. Reg. 33,290, 33,424 (May 19, 1980) (to be codified at 40
16 C.F.R pt. 122). This provision was intended to prevent polluters from using the waste treatment
17 exclusion as a means of impounding WOTUS for waste disposal purposes. (Dkt. No. 33 at 9.)
18 However, two months later, the U.S. Environmental Protection Agency (the “EPA”) suspended
19 the limiting language (the “suspension”) without notice-and-comment in response to industry
20 concerns, stating that “EPA intends promptly to develop a revised definition and to publish it as
21 a proposed rule for public comment. At the conclusion of that rulemaking, EPA will amend the
22 rule, or terminate the suspension.” Consolidated Permit Regulations, 45 Fed. Reg. 48,620,
23 48,620 (July 21, 1980) (to be codified at 40 C.F.R pt. 122).

24 In 1983, the EPA continued the suspension. CWA Environmental Permit Regulations, 48
25 Fed. Reg. 14,146, 14,157 n.1 (Apr. 1, 1983) (40 C.F.R. § 122.2). In 1984, the EPA issued a
26 proposed waste treatment system exclusion, which was finalized in 1988 following a notice-and-

1 comment period. CWA § 404 Program Definitions and Permit Exemptions, 53 Fed. Reg. 20764,
2 20764 (June 6, 1988) (to be codified at 40 C.F.R. pt. 232). In 1986, the Army Corps of Engineers
3 (the “Corps”) published an updated WOTUS definition that maintained the suspension. Final
4 Rule for Regulatory Programs of the Corps, 51 Fed. Reg. 41206, 41,250 (Nov. 13, 1986) (33
5 C.F.R. § 328.3).

6 **B. 2015 Final Rule**

7 In 2014, Defendants proposed a revised WOTUS definition with “no change to the
8 exclusion for waste treatment systems” Definition of WOTUS under the CWA, 79 Fed.
9 Reg. 22,188, 22,189 (Apr. 21, 2014) (to be codified at 40 C.F.R. pt. 122). Defendants specified
10 that they “[did] not seek comment on [the suspension]” because they did not intend to change it.
11 *Id.* at 22,190. Plaintiffs submitted comments on the revisions. (*See* Dkt. Nos. 67-1, 67-2.)
12 Defendants did not consider comments regarding the suspension because those comments were
13 “outside the scope of the proposed rule.” CWA: Definition of WOTUS, 80 Fed. Reg. 37,054,
14 37,097 (June 29, 2015) (to be codified at 40 C.F.R. pt. 122). On June 29, 2015, Defendants
15 promulgated the “Clean Water Rule: Definition of ‘Waters of the United States’” (the “2015
16 Final Rule”), which included, among other revisions, a renewal of the suspension. *See id.* at
17 37,114. The 2015 Final Rule also defines three categories of waters: (1) waters that are
18 “jurisdictional-by-rule,” which are categorically included in the definition of WOTUS and are
19 thus protected under the CWA; (2) waters that are protected for having a “significant nexus” to
20 jurisdictional waters; and (3) waters that are categorically excluded from the definition of
21 WOTUS, including those within the waste treatment system exclusion. 80 Fed. Reg. at 37,058–
22 59.

23 **C. Procedural History**

24 On August 20, 2015, Plaintiffs sued Defendants, alleging that Defendants violated the
25 terms of the CWA when they enacted the 2015 Final Rule. (Dkt. No. 1 at 16–17.) Plaintiffs also
26 allege that the 2015 Final Rule is arbitrary and capricious under the Administrative Procedure

1 Act (APA), 5 U.S.C. §§ 701–06, and that Defendants’ failure to address the suspension
2 constitutes an unlawfully withheld or unreasonably delayed agency action in violation of the
3 APA. (*Id.* at 18–19.) Plaintiffs allege that they and their members “are harmed by provisions in
4 the [2015] Final Rule that deprive certain waters of the protections afforded under CWA
5 programs, increasing the potential for pollution and other adverse harm to waters that Plaintiffs
6 and their members use and enjoy and work to protect.” (*Id.* at 3.)

7 On May 1, 2018, Plaintiffs amended their complaint, adding a challenge to a second final
8 rule, 82 Fed. Reg. 55,542 (Nov. 22, 2017) (the “Applicability Date Rule”), promulgated by the
9 EPA and the Corps. (Dkt. No. 33 at 19–21, 24–25.) Plaintiffs alleged that Defendants lacked
10 statutory authority to promulgate the Applicability Date Rule, and that the Applicability Date
11 Rule was arbitrary and capricious under the APA. (*Id.* at 24–25.) Intervenors, a number of
12 industry groups, were granted leave to intervene. (*See* Dkt. Nos. 41, 50.) On November 26, 2018,
13 after Plaintiffs moved for summary judgment, the Court ultimately vacated the Applicability
14 Date Rule nationwide. (*See* Dkt. No. 61.)

15 **D. Pending Summary Judgment Motions**

16 On April 4, 2019, Plaintiffs filed a second motion for summary judgment, asserting that
17 the waste treatment system exclusion and continued suspension of its limiting language in the
18 2015 Final Rule is illegal because it contravenes statutory authority and congressional intent, it is
19 arbitrary and capricious, and was carried out without the APA’s mandatory notice-and-comment
20 period. (Dkt. No. 67 at 10–17.) Plaintiffs seek a declaratory ruling and permanent injunction
21 halting the enforcement of the waste treatment system exclusion until Defendants complete a
22 legal rulemaking. (*Id.* at 18.)

23 Intervenors filed a cross-motion for summary judgment, alleging that Plaintiffs lack
24 standing, their claims are time-barred, their claims will soon be moot, and their claims lack
25 merit. (Dkt. No. 72 at 2.) Defendants filed a cross-motion for summary judgment, alleging that
26 Plaintiffs have not shown standing and that their claims are time-barred and meritless. (*See* Dkt.

1 No. 79 at 7–8.)

2 **E. Mootness Question**

3 Intervenors claim that Plaintiffs’ claims will soon become moot because the EPA and the
4 Corps proposed a rule to repeal the 2015 Final Rule (“proposed repeal rule”), which is expected
5 to be finalized in August 2019. (Dkt. No. 72 at 4, 12); *see* Definition of WOTUS—
6 Recodification of Preexisting Rule, 83 Fed. Reg. 32227 (July 12, 2018) (to be codified at 40
7 C.F.R. pt. 122). The EPA and the Corps held a public comment period for the proposed repeal
8 rule. (Dkt. No. 72 at 4, 12.) The proposed repeal rule would restore regulations “to their pre-2015
9 form, complete with the original waste treatment system provision that has neither changed nor
10 been challenged for 40 years and is not the subject of this suit.” (*Id.*) Additionally, Intervenors
11 argue that Plaintiffs’ claims will be “doubly moot” because the agencies have proposed a rule to
12 revise the WOTUS definition, invited comments on the proposed rule, and are expected to
13 finalize the rule in December 2019. (*Id.* at 4, 12, 19.) Plaintiffs commented on the proposed
14 WOTUS revision. (*See id.* at 12, 19; *see also* Dkt. No. 73-12.) Neither Plaintiffs nor Defendants
15 addressed the issue of mootness in their summary judgment briefing. (*See generally* Dkt. Nos.
16 67, 79, 83, 87.)

17 **II. DISCUSSION**

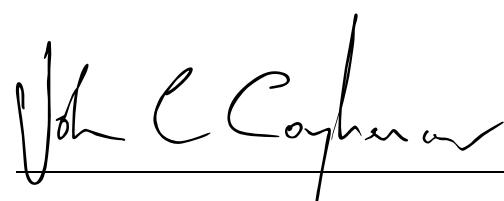
18 The Court hereby ORDERS the parties to submit additional briefing to address the
19 following questions. First, the parties must explain the proposed repeal rule and define the
20 resulting pre-2015 rule. Second, the parties must explain the impact of the recodification of the
21 pre-2015 rule on the statute of limitations regarding Plaintiffs’ waste treatment system exemption
22 claims. Third, the parties must explain the impacts of: (1) the proposed repeal rule; and (2) the
23 proposed WOTUS definition revision on (a) the lawsuit as a whole, and (b) Plaintiffs’ pending
24 summary judgment motion and requests for (i) declaratory relief and (ii) injunctive relief. Fourth,
25 the parties must explain why the Court should not stay this case pending the anticipated
26 finalization of the proposed repeal rule in August 2019.

1 **III. CONCLUSION**

2 For the foregoing reasons, the Court hereby ORDERS the parties to submit additional
3 briefing addressing the questions set forth above no later than Friday, August 2, 2019. Each
4 party's briefing shall not exceed eight (8) pages. If the parties fail to respond, the Court shall stay
5 the case.

6 DATED this 24th day of July 2019.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE